THELMA M. ECKERT

IBLA 91-273 Decided September 18, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing as untimely an appeal from a previous decision conforming Parcel B of Native allotment AA-4142 to survey.

Dismissed.

1. Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Appeals: Timely Filing

   Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

2. Alaska: Native Allotments--Appeals: Generally--Res Judicata--Rules of Practice: Appeals: Standing to Appeal

   When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

APPEARANCES: Bobby Dean Smith, Esq., Anchorage, Alaska, for appellant Thelma M. Eckert; Gregory Peters, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Native allotment applicant, John A. Savo; Regina L. Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Alaska State Office, Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Thelma M. Eckert has appealed from an April 3, 1991, decision of the Alaska State Office, Bureau of Land Management (BLM), summarily dismissing her appeal from an earlier decision, dated January 8, 1991, rejecting the village selection application, as amended (AA-6680-A), of Paug-Vik Incorporated, Limited (Paug-Vik), filed on behalf of the Native village of Naknek, as to the lands within Native allotment AA-4142, Parcel B, of John H. Savo, and allowing Savo 30 days to state whether BLM's survey of Parcel B contained all lands described in his allotment application.

Savo originally filed two Native allotment applications under the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1988), repealed with a savings provision by the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1988). Savo's first application, filed with the assistance of the Bureau of Indian Affairs, was received by BLM on October 30, 1968, and encompassed 5 acres in sec. 26, T. 16 S., R. 47 W., Seward Meridian. BLM assigned serial number AA-4142 to this application. Savo filed his second application for 65 acres of adjoining land on March 30, 1971. The first application was further identified as AA-4142, Parcel A, and the second application received serial number AA-4142, Parcel B.

BLM approved Savo's application for Parcel A by decision dated March 28, 1975, and a certificate of allotment issued for Parcel A on January 13, 1989. BLM denied the application for Parcel B in the same decision, but because Savo was not provided with an opportunity for a hearing at which he could dispute the factual grounds for BLM's rejection, see Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), BLM reinstated the application and resumed its review in July 1979. By decision dated March 21, 1983, BLM determined that Parcel B was legislatively approved, effective June 1, 1981, in accordance with section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1643(a) (1988), and it notified him that he had 60 days in which to provide an amended description of Parcel B or it would proceed to survey the lands as described in the application. Savo did not file an amendment.

Over 3 years later, on September 17, 1986, Eckert filed with BLM a protest of Savo's "Native allotment application AA-4142." By decision dated April 14, 1987, BLM dismissed Eckert's protest because it was not timely filed, stating that under section 905(a)(2) of ANILCA, 43 U.S.C. § 1634(a)(2) (1988), a pending allotment application must be adjudicated pursuant to the Native Allotment Act only if a protest is filed within 180 days after the effective date of ANILCA, December 2, 1980. BLM concluded that objections received in June 1969, and September 1986, did not constitute timely protests. Eckert appealed BLM's April 14, 1987, decision to this Board. In Thelma M. Eckert, 115 IBLA 43 (1990), the Board affirmed BLM's decision summarily dismissing Eckert's protests, finding "that when Eckert did not protest during the statutory time period, she was barred from challenging the validity of either of Savo's applications identified as AA-4142." Id. at 48.

BLM's January 8, 1991, decision addressed only allotment application AA-4142, Parcel B. As noted, BLM rejected Paug-Vik's village selection application, to the extent it described lands in Parcel B of Savo's Native allotment application, and further allowed Savo 30 days to submit information concerning whether BLM's survey correctly covered the lands described in his application and in BLM's March 21, 1983, notice to Savo.

BLM's decision was served upon counsel for Eckert on January 11, 1991, as evidenced by the return receipt card in the case file. On February 11, 1991, counsel for Eckert mailed a copy of the notice of appeal to this Board, but not to BLM. The notice of appeal was not filed with BLM until March 12, 1991. On April 3, 1991, BLM issued its decision dismissing Eckert's appeal, stating that it had been filed with BLM after the mandatory 30-day time limit, and that BLM had accordingly closed the case file.

On May 3, 1991, Eckert, through counsel, filed a notice of appeal with the Board from BLM's decision dismissing her appeal from BLM's January 8, 1991, decision. In the statement of reasons (SOR) for appeal, counsel for Eckert asserts that on February 11, 1991, "within the time prescribed by regulation," he filed an appeal of BLM's January 8, 1991, decision. He states that "[c]opies of this appeal were provided to the appropriate parties, and, in addition, the appeal was appropriately captioned for filing with the Alaska state office of the Bureau of Land Management in Anchorage, Alaska" (SOR at 1-2). He attached as Exhibit 1 a copy of the return receipt cards indicating that "all appropriate parties including the Regional Solicitor's office were provided with a copy of the notice of appeal." Id. at 2.

In support of the assertion that the notice of appeal was timely filed, counsel for Eckert submitted the affidavit of his legal secretary, Nicole Holliday. She states that "[o]n the 11th day of February, 1991, [she] erroneously mailed the original copies of documents entitled NOTICE OF APPEAL and ENTRY OF APPEARANCE" to this Board. She contends that she made all the "necessary mailings but accidentally sent the original that was to be filed" with BLM to the Board. In addition, she states that she called the Board and spoke with the Board's docket attorney, who, she claims, "instructed [her] to immediately send a copy of the original Notice of Appeal and Entry of Appearance to the Bureau of Land Management * * * in Anchorage," and who further indicated that he would call BLM and "in fact verify receipt of the documents and explain that the Notice of Appeal was timely filed to the appropriate person at the Bureau of Land Management" (Affidavit at 2). Thereupon, counsel for Eckert had a copy of the notice of appeal hand delivered to BLM, which received it on March 12, 1991.

[1] BLM's January 8, 1991, decision advised as follows concerning the filing of an appeal to the Board of Land Appeals:

> If an appeal is taken, the notice of appeal must be filed with the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7599 within 30 days of the receipt of this decision. Do not send the appeal directly to the Board. The appeal and case history file will be sent to

the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 222 West Eighth Avenue, #34, Anchorage, Alaska 99513-7584. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. [Emphasis added.]

Counsel for Eckert received a copy of BLM's January 8, 1991, decision on January 11, 1991. Counsel for Eckert mailed the original of Eckert's notice of appeal to this Board on February 11, 1991, the last day of the 30-day period allowed under 43 CFR 4.411 for filing a notice of appeal. Although counsel for Eckert asserts that Exhibit 1 to Eckert's SOR indicates that "all appropriate parties" were provided with a copy of the notice of appeal, Exhibit 1 does not indicate that the notice of appeal was filed with the Alaska State Office, BLM.

The failure of counsel for Eckert to file the notice of appeal with the office rendering the decision is contrary to Departmental regulation 43 CFR 4.411(a), which provides as follows:

> § 4.411 Appeal; how taken, mandatory time limit.
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> (a) A person who wishes to appeal to the Board [of Land Appeals] must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. [Emphasis supplied.]

As indicated above, BLM's January 8, 1991, decision expressly advised Eckert to this effect.

In San Juan Coal Co., 83 IBLA 379 (1984), we considered a similar case where a would-be appellant filed its notice of appeal with this Board, but not with the office of the officer who made the decision. In dismissing San Juan Coal Company's appeal, the Board fully articulated the rationale underlying the "place-of-filing" rule established in 43 CFR 4.411(a):

> The purpose of the requirement [in 43 CFR 4.411(a)] that the notice of appeal be filed in the office of the officer who made the decision (the "place-of-filing" rule) is to provide first notice to such office, in this case BLM. BLM is the exclusive custodian of records for matters on which it renders decisions. Neither the Board nor the Solicitor has any information whatsoever in its possession about matters pending before BLM. When a notice of appeal is filed with BLM, it then forwards this information to the Board and, in some cases, to the Solicitor, for review in connection with the appeal. Were we to allow appellants to violate the place-of-filing rule, it would be impossible to ascertain whether BLM is aware that a notice of appeal has been

filed without communicating with it in every case. In view of the large number of cases to the Board, this would present an insupportable administrative burden.

The place-of-filing rule also fosters administrative and program efficiency for BLM. Pursuant to the provisions of 43 CFR 4.21, the timely filing of a notice of appeal suspends the effect of the decision appealed from, except as otherwise provided by law or regulation. The most expedient way for the purposes of this regulation to be fulfilled is for notices of appeal to be filed with the proper BLM office.

Thus, for the sake of administrative convenience, the Department promulgated regulations governing place of filing, and BLM has been careful to notify appellants of these regulations. [The appellant] was expressly advised by BLM, both of the requirement that its appeal must be filed with BLM and not with the Board, and of the consequences of its failure to file it properly. Accordingly, it works no injustice to enforce this requirement strictly.

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[I]t is certain, and [appellant] has admitted, that no notice of appeal was filed with BLM within the mandatory 30-day time limit established in 43 CFR 4.411(a), or within the 10-day grace period established in some circumstances by 43 CFR 4.401(a). Under 43 CFR 4.411(b), "[i]f a notice of appeal is filed after the grace period provided in § 4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken." Accordingly, [the] notice of appeal may not be considered.

Even assuming the [appellant's] failure to file correctly were inadvertent, we would be bound to enforce the provisions of 43 CFR 4.411(a), since they determine the jurisdiction of the Board to hear an appeal. The language chosen for this section leaves no room to question that the place-of-filing requirement is mandatory and, thus, not subject to waiver. See Red Rock Gold & Recreational Association, Inc., 77 IBLA 87 (1983). In the absence of a timely notice of appeal, the Board lacks jurisdiction to consider [the] appeal. Gary T. Suhrie, 75 IBLA 9 (1983); James M. Chudnow, 72 IBLA 60 (1983); and cases cited.

San Juan Coal Co., supra at 380.

As noted, counsel for Eckert did mail the original of the notice of appeal to this Board on February 11, 1991, 30 days from the date of receipt of the decision under appeal. Under 43 CFR 4.401(a), a delay in filing will be waived "if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before

the end of the period in which it was required to be filed." (Emphasis added.) However, the grace period embodied in this regulation does not apply in this case, since the notice of appeal in question was not transmitted to the office in which the filing was required, i.e., the Alaska State Office, BLM. As the Board ruled in San Juan Coal Co., supra at 380, the place-of-filing requirement is explicit that the notice of appeal must be filed in the office of the officer who rendered the decision, and that filing with the Board will not meet the requirement. Regulation 43 CFR 4.411(a) could not be more clear on this point, stating as it does that "[a] person who wishes to appeal to the Board [of Land Appeals] must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal." (Emphasis added.) The Board has no choice but to dismiss Eckert's appeal from BLM's April 3, 1991, decision. Her failure to file an appeal from BLM's January 8, 1991, decision, in the proper office in a timely fashion deprives the Board of jurisdiction in the case. 1/

[2] Even if Eckert's notice of appeal had been filed timely, in the proper office establishing the Board's jurisdiction to consider the appeal, the Board would dismiss it on another basis. We have discussed the background of the Board's decision in Thelma M. Eckert, supra, and the Board's finding therein that by not filing a "protest during the statutory time period, [Eckert] was barred from challenging the validity of either of Savo's applications identified as AA-4142." Id. at 48. By filing an appeal from BLM's January 8, 1991, decision, Eckert again seeks to challenge the validity of Savo's allotment application AA-4142, Parcel B. In her SOR for that appeal, she offers several reasons why BLM should hold application AA-4142, Parcel B, for "rejection as to that portion of the application on which appellant Eckert has improvements located together with sufficient lands to allow for access to appellant Eckert's setnet site for which the improvements were constructed" (SOR for Appeal from Jan. 8, 1991, Decision at 4). The argument that Eckert had placed certain improvements upon lands claimed in Savo's allotment application, and that his application should be adjudicated under the Native Allotment Act of 1906, was central to Eckert's protest which was dismissed by BLM on April 14, 1987. See SOR to Eckert's Appeal from BLM's April 24, 1987, Decision at 2. As noted, the Board affirmed BLM's dismissal of Eckert's protest in Thelma M. Eckert, supra.

Clearly, by filing an appeal from BLM's January 8, 1991, decision, Eckert is attempting to revive her challenge to the validity of Parcel B of Savo's Native allotment. As previously noted, the Board stated in

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1/ As indicated, the legal secretary for Eckert's counsel asserted in her affidavit that the Board's docket attorney represented that he would call the Alaska State Office and "verify receipt of the documents and explain that the Notice of Appeal was timely filed" (Affidavit at 2). According to a note to the file, the Board's docket attorney indicated to her that she should send a copy of the notice of appeal to the Alaska State Office, BLM, but whether it could be filed timely would depend upon when counsel for Eckert received the decision he sought to appeal. The Board's docket attorney is without authority to confer jurisdiction upon the Board where it is lacking.

Thelma M. Eckert, supra at 48, that by failing to file her protest within the statutory time period, "she was barred from challenging the validity of either of Savo's applications identified as AA-4142." Such failure precluded Eckert from further disputing the validity of Parcel B in this Department. Thus, BLM's issuance of a decision conforming Savo's allotment, which had already been approved, to its survey, did not confer upon Eckert the right to advance another challenge to the validity of his allotment. The doctrine of administrative finality precludes reconsideration of that matter now. State of Alaska, 117 IBLA 373, 376 (1991); Village of South Naknek, 85 IBLA 74 (1985).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Eckert's appeal from BLM's April 3, 1991, decision is dismissed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge